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Defending *Punishment*: Reply to Critics

Thom Brooks

Introduction

I am very grateful to the contributors for this symposium for their essays on my *Punishment* book. Each focuses with different elements of my work. Antony Duff examines the definition of punishment in my first few pages.¹ Michelle Madden Dempsey analyses the importance given to coherence in my account and critique of expressivist theories of punishment.² Richard Lippke considers my statements about negative retributivism in an important new defence of that approach.³ I examine each of these in turn below. While I do not change my position, they draw attention to certain features in my overall argument worth reflecting on at greater length. So I welcome this opportunity to address and clarify these now and grateful for their helping me to rethink my original arguments.

Duff on definitions

Duff begins the symposium challenging the definition of punishment that starts my book, citing my proposed definition:

- (1) Punishment must be for breaking the law.
- (2) Punishment must be of a person for breaking the law.
- (3) Punishment must be administered and imposed intentionally by an authority with a legal system.
- (4) Punishment must involve a loss.⁴

My purpose is to define and clarify what is meant by the term ‘punishment’ in my book. This definition should make clear that my use of ‘punishment’ is restricted to the breaking of law by individuals administered and imposed intentionally by an authority involving a loss within a legal system. So my aim is to consider punishment as *a legal practice* and examine its justification.

This aspect is important. Part of my argument is that too many discussions about punishment fail to connect punishment with crime. It is true we often hear talk about ‘punishing’ a child for misbehaviour, but I argue this talk is metaphorical and that such a practice is different from our legal practices—and these legal practices are my focus. Either there is nothing distinctive about ‘legal punishment’ versus talk of punishment in other contexts, or this difference matters and I claim that it does.

Duff first denies that punishment must be for breaking the law. He says:

A range of institutions—including schools, universities, religious organisations, many kinds of business, professional associations—operate with codes of ethics or discipline, and with officers or committees who are authorised to impose punishments

¹ See R. A. Duff, ‘How not to Define Punishment’, *Philosophy and Public Issues* (2015).

² See Michelle Madden Dempsey, ‘Punishment Theory and Coherence: A Comment on Thom Brooks’ *Punishment*, *Philosophy and Public Issues* (2015).

³ Richard L. Lippke, ‘Elaborating Negative Retributivism’, *Philosophy and Public Issues* (2015).

⁴ Thom Brooks, *Punishment* (London: Routledge, 2012): 1—2.

on those who violate them: what is imposed can count as a punishment only if it is purportedly imposed for the commission of a specified offence, and is imposed by someone with the authority to do so.⁵

At first glance, readers might think Duff and I agree: punishments are only imposed where someone has committed an offence. But notice how Duff makes this point about *punishments* by changing what is meant by *offences*: Duff's reference to 'a specified offence' is to some breach of a code of ethics and not crime. It is hardly surprising that Duff rejects my narrower focus as he counts as an 'offence' more than unlawful conduct and counts as 'punishment' more than actions connected to unlawful conduct. His understanding of possible crimes and punishments is over-inclusive and goes beyond the criminal law and sentencing policy. He refers to 'many other punitive contexts' and their 'disciplinary code' leading him to claim we need not consider as offences conduct that is 'defined as criminal by the law'.⁶ Duff's non-legal understanding of offences and their punishment is intended to demonstrate that my narrower focus on criminal law and sentencing is incorrect, but all Duff does here is use one definition to refute another.⁷

Duff next claims that 'careful definers' of punishment note it must be of an alleged offender for alleged offences.⁸ He disagrees with my statement that punishment is 'of a person for breaking the law'.⁹ Duff claims it is 'an odd restriction' because it demands that punishment be justified and 'it forbids us to object that punishment is unjust when it is posed on an innocent person; such impositions, on the Brooks definition, do not count as punishments' and so cannot be condemned as such.¹⁰ Duff claims we should distinguish between whether what we do to another is punishment and whether it is justified.

But this is an odd criticism. We don't punish people alleged to have committed a crime, but persons convicted for it. Curiously, Duff appears to argue that something counts as punishment if its definition is aimed at the guilty 'and must be of the actual guilty' even where the person punished is innocent, but wrongly sentenced. This is odd because it commits Duff to accepting that (positive) retributivists—that require offenders possess desert in order to justify punishment—would claim that any wrongfully convicted persons are punished despite their innocence. Desert does not only justify the amount of punishment to be distributed, but the distribution itself. Perhaps our disagreement is that Duff calls imprisoning innocent people a form of unjust punishment and I would call it a miscarriage of justice:

⁵ Duff, 'How not to Define Punishment', 2.

⁶ Duff, 'How not to Define Punishment', 3.

⁷ Dempsey is also critical of this part of my definition stating that 'we should not assume away the existence and justification of *non-legal punishments*—nor should we presuppose that *legal punishment* presents the central case of *punishment*' (emphasis added). This distinguishes between 'punishment' as a category that includes 'legal punishments' and 'non-legal punishments'. In Dempsey's language, my project is concerned entirely with legal punishment (which I refer to as 'punishment'). I don't consider how (legal) punishment might connect with other forms of non-legal sanction: my examination considers the justifications on offer for legal punishment to gain greater clarity within this narrow focus. I do not see how my examination of legal punishment benefits as a project concerned with legal punishment by considering other cases of non-legal sanctions. So I don't doubt that people refer to non-legal practices as punishment (such as punishing a child) and I don't claim they are unimportant or uninteresting, but they are concerns that appear to go beyond the particular phenomena of legal punishment that is my focus. This dispute seems more a quibble over definitions than concerns about substance as far as this specific issue is concerned.

⁸ Duff, 'How not to Define Punishment', 3.

⁹ Brooks, *Punishment*, 3.

¹⁰ Duff, 'How not to Define Punishment', 3.

punishment would be not merely normatively inadequate, but should never have happened. We can agree innocent people endure some form of loss perhaps, but my point remains: punishments are not to be understood or justified isolated from the offences that give rise to them—so this important link between crime and punishment is absent where the innocent are concerned. The criminal justice system does indeed send innocent people to prisons, but they are neither deserved, rehabilitated, etc. because what they endure is not punishment but injustice. And this gives rise to justified rights to make claims for compensation in recognition they did not receive justice.

Duff considers my comments on punishment and loss. He is critical of my brief note that a violent psychopath tempted to kill without provocation might be incapacitated on my unified theory of punishment ‘regardless of culpability’.¹¹ Duff initially states concerns about we should count someone’s detention as punishment where they lack culpability. Of course, someone need not be culpable to be convicted of a criminal offence. Examples include possession offences of strict liability.

Duff overlooks a key point. In this part of my book, I was arguing that the unified theory of punishment that I defend takes a distinctive view about the relation between crime and punishment. I argue that the crimes should be understood as violations of rights and punishments is an attempt to restore them. In some cases no such restoration may be necessary and this is one way pardons might be justified on my view. But if punishment is about maintaining a system of rights where crimes are punished in proportion to their centrality within this wider system, then what to make of cases where clear public dangers exist but may lack culpability? My point is that culpability may not be required to justify the distribution of punishment, including (but not restricted to) cases like this.

Finally, Duff provides a narrow criticism of my fairly extensive rejection of expressivist and communicative theories, including his own theory. Duff focuses on my discussion of Feinberg’s distinction between punishment and a penalty where punishment refers to hard treatment such as prison and penalty refers to sanctions. Duff claims this distinction is important and can be made where a sanction ‘is intended to convey a formal censure’—and this is true of both hard treatment and ‘non-custodial’ sanctions.¹²

But this attempted defence concedes my argument. I argue that Feinberg’s distinction between punishment as hard treatment and penalties as other forms of sanctions is drawn too sharply because the expression of public censure can be present in sanctions other than imprisonment. I argue this might even be true with verbal warnings. Duff now appears to accept my criticism, but his reason for continuing to see a clear distinction anyway is at best unclear. Moreover, Duff overlooks a key point in my argument that punishments in practice rarely take the form of a prison sentence *or* a monetary fine *or* some other sanction. Instead, two or more might be imposed together as *the punishment* of an offender: so actual court outcomes for an offender can include a combination of a fine, suspended sentence, community order and perhaps others. Our choice is not hard treatment or an alternative, but often which package of penal options are justified for an offender. I argued it was difficult to see how some, but not all, parts of the same punishment could rest on different justificatory bases between expressivist and non-expressivist forms. This line is drawn too sharp because

¹¹ Brooks, *Punishment*, 141.

¹² Duff, ‘How not to Define Punishment’, 7.

any (justified) punishment expresses public censure for illegal conduct although each may differ in degree, at least metaphorically and perhaps only metaphorically. But this is a mistake that could have been avoided if legal punishment was more closely tied to the criminal law and sentencing policy.

Dempsey on coherence and expressivism

Dempsey raises two main concerns with *Punishment*. First, she is critical of the role and importance of coherence in my account of punishment. She rightly notes that I would reject a ‘Pick-a-Mix’ theory of punishment where we simply select any consideration for justifying punishment that we favour or reject punishment altogether for its lack of justification.¹³ Dempsey notes that my criticism of the Model Penal Code is that it is a kind of Pick-a-Mix theory. The Model Penal Code says at §1.02:

- (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
- a. to prevent the commission of offences;
 - b. to promote the correction and rehabilitation of offenders;
 - c. to safeguard offenders against excessive, disproportionate or arbitrary punishment;
 - d. to give fair warning of the nature of the sentences that may be imposed on convictions of an offence;
 - e. to differentiate offenders with a view to a just individualization in their treatment.

The Model Penal Code is a kind of Pick-a-Mix ‘theory’ of punishment because it offers multiple penal purposes which may clash with one another and without any structure for how any potential clashes can be managed, if not avoided. Moreover, the penal purposes listed in the Model Penal Code may be commendable, but why *these* particular purposes? How should they be considered when applied to particular cases? Missing is a justification of these parts to punishment’s justification as a whole.

Dempsey does not disagree with my critique *per se*, but rather my alternative. She says:

What is it that makes the unified theory unified? Brooks’ explanation is opaque. He claims that “[t]he unified theory of punishment overcomes this problem” of incoherence because “[i]t addresses desert, proportionality, and other penal goals [as] they come together within a larger framework.” To this point in his explanation, we must take it on trust. The unified theory is unified because Brooks keeps telling us it is.¹⁴

She concludes: ‘Brooks offers no account of how this cohering relation between multiple penal goals is achieved under the unified theory’.¹⁵ For Dempsey, there appears little, if any, substantive difference between Pick-a-Mix theories like the Model Penal Code and my unified theory of punishment.

It is worth reconsidering how the unified theory is unified. Recall the importance of the link between crime and punishment for my account: there is no justified punishment for

¹³ Dempsey, ‘Punishment Theory and Coherence’, 3—4.

¹⁴ Dempsey, ‘Punishment Theory and Coherence’, 5.

¹⁵ Dempsey, ‘Punishment Theory and Coherence’, 5.

an unjustified crime. I claim that crimes should be understood as a kind of rights violation. Punishment is justified for the restoration and maintenance of rights. Desert can be captured by the importance that someone has violated, for example. Following Alan Brudner, I argue this view of ‘legal retributivism’ overcomes problems found with Legal Moralism’s ‘moral retributivism’.¹⁶ Penal principles such as crime reduction or rehabilitation can be justified insofar as they can contribute to the restoration and maintenance of rights threatened by crime. Proportionality is determined by considering the centrality of the right affected.¹⁷ Dempsey rightly notes that this view of proportionality concedes that some communities will view the relation between crimes and punishments differently from others. For the unified theory of punishment, this is not problematic *per se* and perhaps inevitable. It may also help us understand how society sets their punishments as an indication for how those who set them view their corresponding crimes with potentially interesting implications over time that I do not consider.

Let me use an example to illustrate, such as theft. This offence is a violation of another’s right to possess property. The amount of justified punishment for the thief depends on a consideration of which possible outcomes are most likely to yield best the restoration and maintenance of rights. Outcomes may not be exclusively preventative or rehabilitative: the reformed offender may wish to avoid the threat of the state imposing further rehabilitation costs in addition to his recognising he should avoid such activities anyway. And it is the case that some communities will choose more punitive outcomes than others, but the unified theory attempts an explanation: these differences can be justified because the context matters. A community under threat because of invasion or civil war is likely to become more threatened by criminal acts like theft than other communities enjoying a secure peace. This is not relativism, but *contextualism* (if it should have a name) because context matters. We can avoid a narrow preoccupation with whether one aim *versus* another is satisfied where we can view them more like a toolbox to help us achieve a restoration of rights. This gives theoretical coherence to why *these* aims or purposes should be included (answer: because they can help us achieve our goal of restoring and protecting rights), but unlikely to provide any specific determination of precisely which package of possible outcomes should be decided. But this is no more a problem for the unified theory of punishment than alternatives, where they run into problems of how much might be ‘deserved’ or what punishment will likely sufficiently deter.

Dempsey’s second concern is that expressivist theories of punishment can give me the unified coherence I’m after and a better alternative. Punishment as the expression of public censure ‘is an auxiliary reason that picks out punishment as a particularly effective way to realize deterrent, rehabilitative, and displacement value’.¹⁸ Dempsey claims that understanding punishment as expressivist sends a message to offender and, as a message to offenders, is thought to communicate some deterrent value. The idea seems to be that if a message is not communicated expressly to a particular individual then it might lack a deterrence effect. I’m unsure about this. Nor do I see that this is how deterrence is more

¹⁶ See Alan Brudner, *Punishment and Freedom* (Oxford: Oxford University Press, 2009).

¹⁷ Duff notes my work claims links with Hegel and the English Idealists, but this is inaccurate because I explicitly connect ideas to the wider British Idealism tradition including Scottish philosophers, such as James Seth and John Stuart Mackenzie. See Brooks, *Punishment*, 127, 129—130, 236—238, 241 and Thom Brooks, ‘James Seth on Natural Law and Legal Theory’, *Collingwood and British Idealism Studies* 12 (2012): 115—132.

¹⁸ Dempsey, ‘Punishment Theory and Coherence’, 6.

effective, and not what I call macrodeterrence (general deterrence) or microdeterrence (specific deterrence) modes. Dempsey further claims that expressivism captures retributive values in communicating a punishment as '*for his crime*' to offenders.¹⁹

I have two concerns with this proposal. The first is whether expressivism is a hybrid theory, in fact. This is considered in chapter 6 of my book and not substantively addressed here (or by Duff who is the principle target of my critique). Expressivism may claim to achieve multiple penal purposes, but they aim to satisfy only one. No expressivist argues that any offender should be punished any more than deserved. It is not implausible to imagine a scenario where an offender who has committed an especially notorious, well publicised crime would receive a lesser sentence if punished for only what is deserved than receive the full brunt of vivid public anger. This causes a particular difficulty for expressivists because they commit themselves to the importance of the public's communication of displeasure while only supporting punishments that meet a different test of retributivist desert. And so I argue in *Punishment* that expressivists—to quote Duff—hold the view that punishment 'must...be understood in retributive terms'.²⁰

My second concern is whether expressivist theories of punishment are even theories of punishment. This is because if public condemnation is what matters, then public condemnation might justify any range of outcomes that may have more to do with who people are or represent than what they have done. Again, expressivists seem to fall back on retributivist justifications and it remains unclear what distinctive difference public displeasure brings to our thinking about punishment where it is held that the only permissible penal outcomes must be deserved.

Dempsey claims expressivism can help provide me with the unified theory I am looking for. But there are questions about expressivism's genuine distinctiveness in practice and whether it even is the hybrid theory it presents itself to be. One illustration of this is Duff's discussion of punishment as secular penance. What is said to be distinctive about Duff's view is that punishment is not only a matter of we, the public, expressing our condemnation of a criminal act in sentencing an offender, but punishment is *also* a matter of the offender communicating to we, the public, an apology through serving a prison sentence. This second part about communication is what makes the view a communicative theory of punishment and not merely an expressivist theory. But offenders need not do anything at all beyond serve the prison sentence they are compelled to endure by the state. It is bewildering to me how it can be claimed secular penance is happening in communicating some message to the public where the offender is coerced and may not, in fact, communicate or express anything at all.²¹ So I am not yet persuaded expressivist theories of punishment are the answer.

Lippke on negative retributivism

In *Punishment*, I target the idea of *positive* retribution understood as the view that desert is necessary and sufficient for punishment. If an offender can be found to deserve punishment, then this is sufficient to distribute punishment to him. I claim this 'standard view' of

¹⁹ Dempsey, 'Punishment Theory and Coherence', 7.

²⁰²⁰ See Brooks, *Punishment*, 115 and R. A Duff, 'Crime, Prohibition and Punishment', *Journal of Applied Philosophy* 19 (2002): 97-108, at 106.

²¹ See Brooks, *Punishment*, 104—105 for this part of my discussion of this view.

retribution is part of ‘a rich, venerable tradition’ that includes a variety of different ideas about how retribution might be understood.²²

While positive retribution understands desert as necessary and sufficient for punishment, *negative* retribution sees desert as necessary, but not sufficient: ‘the *severity* of punishment may be determined by factors beyond desert, such as favourable consequences’.²³ In my discussion, I note that ‘both [positive and negative] retributivisms might endorse similar punishments, but with different justifications’.²⁴ They each might punish the same offender differently, but I do not say or suggest that either would punish a thief more than a murderer.²⁵ Lippke claims that negative retributivism has two constraints: the first forbids punishing the innocent and the second forbids ‘disproportionate’ punishment of the guilty. Lippke says my characterisation captures the first, but not the second although it should also be clear that *nothing* I say about negative retributivism contravenes the second constraint either.²⁶

My critique of negative retribution argues that it is a type of rule utilitarianism, ‘and perhaps with all the concerns that rule utilitarianism attracts’.²⁷ The main concern is ‘that the justification for the rules that constrain desired consequences may differ from the justification for why we should pursue these consequences’.²⁸ For example, if desert is so important for selecting who might be punished, why should it not play the most important, if not only, role in determining the punishment’s amount? Or if non-desert factors are so important that they should play the most prominent role, then why be constrained by desert if it inhibited pursuit of such non-desert factors? In *Punishment*, I argue that ‘perhaps there is good reason to distribute punishment in a particular way and a different good reason to justify the practice of punishment. What we require is some third reason to justify how these reasons come together, if negative retributivism is to be a theoretically coherent theory of punishment’.²⁹ My conclusion is that negative retributivist accounts have lacked this theoretical coherence.

Lippke’s negative retributivism claims the general justifying aim of legal punishment is crime reduction, but subject to the retributivist constraints concerning we only punish the guilty and not disproportionately so.³⁰ So how important are non-retributivist factors? We require retributivist desert because it is necessary for justified punishment on this view. But any justified punishment must also be proportionate—specifically, proportionate to the retributivist desert an offender possesses.

So how is Lippke’s negative retributivism *not* positive retributivism where crime reduction plays no part? Lippke admits his understanding of negative retribution is ‘a more retributively-flavored theory of legal punishment’ than it is often believed to be.³¹ While acknowledging that there might be some exceptional circumstances where individuals are found to be so dangerous that their imprisonment beyond their original sentence might be

²² See Brooks, *Punishment*, 15, 33.

²³ Brooks, *Punishment*, 33.

²⁴ Brooks, *Punishment*, 33.

²⁵ See Brooks, *Punishment*, 33—34.

²⁶ Lippke, ‘Elaborating Negative Retributivism’, 2.

²⁷ Brooks, *Punishment*, 98.

²⁸ Brooks, *Punishment*, 98.

²⁹ Brooks, *Punishment*, 99.

³⁰ Lippke, ‘Elaborating Negative Retributivism’, 2.

³¹ Lippke, ‘Elaborating Negative Retributivism’, 3.

warranted on some views of negative retributivism, it is unclear on what grounds this would be true for Lippke especially where he appears not to accept this as a problem for his own view.³²

The only comment about non-desert factors playing some role in his theory arises in his discussion about how punishment as a practice ought not to degrade those punished. Lippke states that this ‘non-degradation constraint’ is ‘like the more familiar retributive constraints’ and so does appear to be exclusive to negative retributivism and not available to positive retributivism.³³ He says: ‘Put simply, we will see less crime in the future if offenders are not degraded (as the retributive constraint enjoins) but also prodded and helped to be morally responsible’.³⁴ In other words, if we punish offenders who are deserving and to the degree deserved, we should recognise that our imposition of punishment should attempt to enable offender rehabilitation by not degrading prisoners and developing their sense of moral responsibility. Rather than elaborating negative retributivism, Lippke appears to defend a position similar to positive retributivism. He avoids the problem of theoretical incoherence I highlighted with negative retributivist accounts by marginalising any role played by crime reduction. Note that the reason we should not punish disproportionately—either too much or too little than deserved within a range—is because of concerns that it might damage an offender’s sense of moral responsibility. Note further that the reason we should not degrade offenders is because of the same concern. An offender’s lack of moral responsibility is not simply a failure to rehabilitate and risk of reoffending, but primarily a failure to take sufficiently seriously the link between desert and punishment. However, it is claimed a retributivist justification and imposition of punishment should contribute to less criminal offending because there should be sufficient importance placed on developing an offender’s moral responsibility.

Let me highlight this important point before turning to other concerns. Lippke convinces me here and elsewhere on many points in legal theory—and chiefly on how our theories of punishment too often fail to account for their relation to practices. Lippke and I may disagree on how much of a negatively retributivist view he presents here, but I accept that any retributivist theory of punishment ought to share the concerns about an offender’s moral responsibility raised first by him.³⁵

There are two striking features of Lippke’s account not already touched on. Note Lippke’s claim that punishment should help to make offenders ‘more morally responsible’.³⁶ This position appears to echo the claim that punishment should be rehabilitative through some form of moral education. The best exponent of this view is Jean Hampton:

Thus, according to moral education theory, punishment is not intended as a way of conditioning a human being to do what society wants her to do (in the way that an animal is conditioned by an electrified fence to stay within a pasture); rather, the theory maintains that punishment is intended as a way of teaching the wrongdoer that

³² Lippke, ‘Elaborating Negative Retributivism’, 4.

³³ Lippke, ‘Elaborating Negative Retributivism’, 5.

³⁴ Lippke, ‘Elaborating Negative Retributivism’, 5.

³⁵ See Brooks, *Punishment*, 225n3.

³⁶ Lippke, ‘Elaborating Negative Retributivism’, 5.

the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason.³⁷

Both Lippke and Hampton appear to share the view that punishment should aim to make offenders more morally responsible. If successful, then offenders will refrain from future offending. Through educating offenders about their *criminal* wrongs as a kind (or kinds) of *moral* wrongs, we can reduce crimes by improving moral responsibility and awareness.

This view rests on an important mistake highlighted by my discussion in *Punishment*. The mistake is that not all crimes are immoral and not all immorality is criminal. There is a ‘*justice gap*’ too often overlooked between where moral education might be a relevant possibility and those crimes for which it is not.³⁸ This gap speaks to the distinction of *mala in se* crimes and *mala prohibita* crimes. The former are thought wrongs independent of their criminalisation by law; the latter are thought wrongs because of their criminalisation. Crimes commonly understood as kinds of *mala in se* are murder and theft. *Mala prohibita* crimes may include drug and traffic offences as well as prostitution although this category is more controversial. My first point is that if there is such a distinction to be made then it is clear not all crimes are moral wrongs and so Lippke’s (and Hampton’s) aim to rehabilitate through heightened moral sensibility might be irrelevant or fall short.

But even if we reject there are *mala prohibita* crimes, then it remains true that most offences included in the criminal law are *strict liability* offences where culpability is irrelevant. The bare fact that someone drove a car on a street above a speed limit is necessary and sufficient to justify a conviction for a traffic offence—and excessive speeding can lead to imprisonment lest this be seen as a trivial illustration. My point is that if not all *criminal* wrongs are *moral* wrongs, then moral education aimed at raising sufficient awareness of an offender’s moral wrongdoing in offending misses its target. For Lippke, ‘we will see less crime in future’, in part, if offenders are ‘helped to be more morally responsible’ (5). But if the issue is instead *legal* responsibility (and not *moral* responsibility), such a crime reduction effort may underperform or even ineffective.

Now let us turn to Lippke’s discussion of my unified theory of punishment. While we agree on the important link between rights and punishment, there are issues worth clarifying further. First, he claims that I am ‘on the right track in pointing to a theory of human rights and the protection of such rights within a legal scheme as providing some of the conceptual and normative backdrop for a theory of legal punishment’ (7).

This mistakes my use of *rights* for *human rights*. I understand these differently whereby human rights—from my explicitly non-natural law perspective—are inclusive of those human rights found in international agreements, such as the European Convention on Human Rights or the UN’s Universal Declaration of Human Rights. *Rights* are different and represent a community’s recognition of freedoms worthy of protection, and may include a special acknowledgement of human rights. I argue that ‘the criminal law aims at the protection of individual *legal rights*. Our legal rights are substantial freedoms worthy of protection for each member’.³⁹ I further clarify my views on the relation between freedom and rights by claiming it is ‘broadly consistent with some versions of the capabilities

³⁷ Jean Hampton, ‘The Moral Education Theory of Punishment’, *Philosophy and Public Affairs* 13 (1984): 212.

³⁸ See Brooks, *Punishment*, 57.

³⁹ Brooks, *Punishment*, 127.

approach, but note that the view of freedom used here may be consistent with several different theories of freedom'.⁴⁰

This is a key point because it makes clear that the kind of *rights* I am discussing are not *human rights per se*. One reason would be that it is unclear that every part of the criminal law we might want to include in our criminal law is concerned with *human* rights alone (that may have a more universal character) than individual legal rights (that might differ from one political community to the next). It is clear that we have rights of movement that can pertain to any defensible view of traffic offences, but it is far from clear how they relate to human rights any better.

This point matters because my unified theory links the proportionality of punishment to the centrality of the right infringed or threatened by a crime. Lippke claims I run with three different possible meanings of what a restoration of rights might entail. The first is about *any* rights, such as to restitution and including conduct addressed by private law.⁴¹ While it is true that rights are protected by more areas of law than the criminal law alone, my focus is clearly on the criminal only. Issues about contract and tort law are interesting, but not part of my examination of punishment and its justification. The second possible meaning Lippke claims to find is a 'censuring aspect' whereby punishment has some expressivist function.⁴² As should now be clear, I do not deny that punishment can be understood—at least metaphorically—as an expression of public censure, but my view rejects expressivist theories. Finally, Lippke claims my discussion of restoration also appears to support the view that punishment aims to reassure the public that rights shall be protected and laws reliably enforced. This is broadly more accurate of my view than the first two which I'd reject. But Lippke then raises the concern that punishment 'curtails or infringes the rights of offenders' and so seems counterproductive as a project of rights protection.⁴³ My argument is that through the use of punishment it can be possible to best maintain and protect our rights. Limiting another's freedom by requiring treatment for serious conditions that have contributed to persistent reoffending is a means to the maintenance and protection of rights not only for the rest of us should reoffending be reduced, if not stopped, but also for the offender. Lippke's criticism would have greater force if punishment was an end in itself. If we punished for its own sake, then it is clearer how restricting rights can pose problems. But if we punish as a means to another good like securing rights, then restricting rights might be justified as a measure of last resort where there is no better alternative to protecting and maintaining rights. And as it should be.

Conclusion

I am especially grateful to Duff, Dempsey and Lippke for these thoughtful and largely constructive comments on *Punishment*. While I can't say that I am convinced my views on punishment should change, these critiques provide a welcome opportunity to spell out in further detail the reasons behind the arguments I offer. I hope they may even shed some further light.

⁴⁰ Brooks, *Punishment*, 236n21.

⁴¹ Lippke, 'Elaborating Negative Retributivism', 7—8.

⁴² Lippke, 'Elaborating Negative Retributivism', 8.

⁴³ Lippke, 'Elaborating Negative Retributivism', 8.

In conclusion, I would like to comment further on two points that arose during a conference organised by the editors of *Philosophy and Public Issues* held at LUISS this past spring. The first point is I was pushed to say more about why punishment should be unified. On the one hand, I appear to align theory to practice. I note that the Model Penal Code and sentencing guidelines across multiple jurisdictions include multiple penal purposes, but without a satisfactory framework for resolving any conflicts between these purposes when applied in practice. So is the unified theory about justifying our practices? This would seem to fit with my broadly Hegel-inspired work, as Hegel saw his philosophy as an effort at discerning the rationality in the world.⁴⁴ Am I doing the same? On the other hand, I appear to be trying to provide a coherent theory about how a unified theory of punishment is possible. So is my aim to provide a theory of punishment or to justify our existing practices?

The short answer is a bit of both. My view is that a coherent, unified theory of punishment is possible and part of its wider importance is it can offer us a possible framework to guide existing sentencing policy. But it is not the bare existence of these policies that provides my primary philosophical motivations, but they are also not irrelevant. A unified theory is not only possible, but it also highlights a neglected tradition of Hegelian thought so there is some importance for the history of ideas from my theory of punishment as well.⁴⁵ But I do not assume our practices are correct or desirable. We should not be interested in a unified theory because our practices cover plural purposes, but instead because these practices get right that these purposes are worth having for sentencing—so what we require is a new framework which my unified theory attempts to provide.

A second point concerns the movement of travel. I focus on rights to be protected and move from there. But it might be objected that I should start with wrongs and go to rights. The problem is that I run a risk of resting my view on an overinflated view of rights.⁴⁶ While I accept that this risk is a concern, I remain unconvinced the alternative mentioned would better avoid this problem.

A book is more than a series of claims and arguments. I spent several years researching, constructing and rewriting the text to cover necessary ground and clarify my positions. After such a major effort, it is immensely satisfying to receive such robust and wide-ranging commentary from so many philosophers I highly respect. I hope these comments go some way to pay back this kindness.⁴⁷

⁴⁴ See Thom Brooks (ed.), *Hegel's Philosophy of Right* (Oxford: Blackwell, 2012) and Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2d (Edinburgh: Edinburgh University Press, 2013).

⁴⁵ See Thom Brooks, 'Is Hegel a Retributivist?' *Bulletin of the Hegel Society of Great Britain* 49/50 (2004): 113—26; Thom Brooks, 'Rethinking Punishment', *International Journal of Jurisprudence and Philosophy of Law* 1 (2007): 27—34; Thom Brooks, 'Punishment and British Idealism' in Jesper Ryberg and J. Angelo Corlett (eds), *Punishment and Ethics: New Perspectives* (Basingstoke: Palgrave Macmillan, 2010): 16—32; Thom Brooks, 'Punishment: Political, Not Moral', *New Criminal Law Review* 14 (2011): 427—38; Thom Brooks, 'Is Bradley a Retributivist?' *History of Political Thought* 32 (2011): 83—96 and Thom Brooks, 'Hegel and the Unified Theory of Punishment' in *Hegel's Philosophy of Right*, pp. 103—23.

⁴⁶ I am especially grateful to Vittorio Bufacchi for raising this concern.

⁴⁷ I am very grateful to Gianfranco Pellegrino, Michele Bocchiola, Vittorio Bufacchi, Michele Mangini and Mario Ricciardi for comments and discussion on *Punishment* during my visit to LUISS earlier this year.